

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA- SOUTHERN DIVISION

ERICA SVENNEBY,) Case No. SACV 17-00769-AS
)
Plaintiff,) **MEMORANDUM OPINION AND**
)
)
v.)
)
NANCY A. BERRYHILL, Acting) **ORDER OF REMAND**
Commissioner of Social)
Security,)
)
Defendant.)
)

PROCEEDINGS

On May 1, 2017, Plaintiff filed a Complaint seeking review of the denial of her application for Disability Insurance Benefits. (Docket Entry No. 1). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Docket Entry Nos. 13-14, 31). On October 5, 2017, Defendant filed an Answer along with the Administrative Record ("AR"). (Docket Entry Nos. 19-20). The parties filed a Joint Submission ("Joint Stip.") on April 25, 2018, setting

1 forth their respective positions regarding Plaintiff's claims. (Docket
2 Entry No. 29).

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4 The Court has taken this matter under submission without oral
5 argument. See C.D. Cal. L.R. 7-15.
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8 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
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10 On March 24, 2014, Plaintiff, formerly employed as a loan
11 modification underwriter for a bank, a real estate broker, an EFT
12 representative for a bank, and a bank teller (see AR 47-48, 170-74),
13 filed an application for Disability Insurance Benefits, alleging an
14 inability to work because of a disabling condition since June 8, 2012.
15 (AR 151-54).

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17
18 On October 27, 2015, the Administrative Law Judge ("the ALJ"),
19 Helen E. Hesse, ("ALJ Duran"), heard testimony from Plaintiff (who was
20 represented by counsel), medical expert Dr. John Morse, and vocational
21 expert Elizabeth Brown-Ramos. (See AR 35-67).¹ On January 20, 2016, the
22 ALJ issued a decision denying Plaintiff's application. (See AR 17-27).
23 After determining that Plaintiff had severe impairments -- "degenerative
24 disc disease of the lumbar spine; mixed connective tissue/autoimmune
25

26
27
28 ¹ The ALJ denied Plaintiff's request to have Plaintiff's
treating rheumatologist testify at the hearing. (See AR 17, 36, 149-
50).

1 disorder with Sjogren's syndrome; positive ANA; positive RA; diagnosis
2 of fibromyalgia with positive tender points; and mixed connective tissue
3 disorder" (AR 20)² -- but did not have an impairment or combination of
4 impairments that met or medically equaled the severity of one of the
5 listed impairments (AR 21), the ALJ found that Plaintiff had the
6 residual functional capacity ("RFC")³ to perform light work⁴ with the
7 following limitations: can climb, bend, balance, stoop, kneel, crouch or
8 crawl occasionally; and can be exposed to unprotected heights
9 occasionally. (AR 21-26).

10
11
12 Relying on the vocational expert's hearing testimony, the ALJ found
13 that Plaintiff was capable of performing her past relevant work as a
14 loan underwriter as generally performed and actually performed, as well
15 as her past relevant work as a real estate agent as generally performed.
16 (AR 26). The ALJ therefore concluded that Plaintiff was not disabled
17 within the meaning of the Social Security Act. (AR 26-27).

18
19
20 The Appeals Council denied Plaintiff's request for review of the
21 ALJ's decision on March 8, 2017. (See AR 1-5). Plaintiff now seeks
22

23 ² The ALJ found that Plaintiff's other physical impairments --
24 ovarian cysts, fibroids, irritable bowel and anemia -- were not
25 medically determinable. The ALJ also found that Plaintiff's mental
impairment -- mood disorder, not otherwise specified -- was nonsevere.
(AR 20-21).

26 ³ A Residual Functional Capacity is what a claimant can still do
27 despite existing exertional and nonexertional limitations. See 20
C.F.R. § 404.1545(a)(1).

28 ⁴ "Light work involves lifting no more than 20 pounds at a time
with frequent lifting or carrying of objects weighing up to 10 pounds."
20 C.F.R. § 404.1567(b).

1 judicial review of the ALJ's decision which stands as the final decision
2 of the Commissioner. See 42 U.S.C. §§ 405(g), 1383(c).
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4

5 **STANDARD OF REVIEW**
6

7 This Court reviews the Administration's decision to determine if
8 it is free of legal error and supported by substantial evidence. See
9 Brewes v. Comm'r, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial
10 evidence" is more than a mere scintilla, but less than a preponderance.
11 Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). To determine
12 whether substantial evidence supports a finding, "a court must consider
13 the record as a whole, weighing both evidence that supports and evidence
14 that detracts from the [Commissioner's] conclusion." Aukland v.
15 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (internal quotation
16 omitted). As a result, "[i]f the evidence can support either affirming
17 or reversing the ALJ's conclusion, [a court] may not substitute [its]
18 judgment for that of the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d
19 880, 882 (9th Cir. 2006).

20
21 **PLAINTIFF'S CONTENTIONS**
22

23 Plaintiff alleges that the ALJ erred in failing to properly: (1)
24 consider the vocational and medical evidence; and (2) consider
25 Plaintiff's testimony. (See Joint Stip. at 4-9, 12-21).
26
27
28

DISCUSSION

After consideration of the record as a whole, the Court finds that Plaintiff's second claim of error warrants a remand for further consideration. Since the Court is remanding the matter based on Plaintiff's second claim of error, the Court will not address Plaintiff's first claim of error.

A. The ALJ Did Not Properly Reject Plaintiff's Symptom Testimony

Plaintiff asserts that the ALJ did not provide legally sufficient reasons for finding that Plaintiff's testimony about her symptoms and limitations was not credible. (See Joint Stip. at 12-21). Defendant asserts that the ALJ provided proper reasons for finding Plaintiff not credible. (See Joint Stip. at 21-22).

1. Legal Standard

Where, as here, the ALJ finds that a claimant suffers from a medically determinable physical or mental impairment that could reasonably be expected to produce her alleged symptoms, the ALJ must evaluate "the intensity and persistence of those symptoms to determine the extent to which the symptoms limit an individual's ability to perform work-related activities for an adult . . ." Soc. Sec. Ruling ("SSR") 16-3p, 2017 WL 5180304, *3.⁵

⁵ SSR 16-3p, which superseded SSR 96-7p, is applicable to this case, because SSR 16-3p, which became effective on March 28, 2016, was in effect at the time of the Appeal Council's March 8, 2017 denial of Plaintiff's request for review. 20 C.F.R. § 404.1529, the regulation on evaluating a claimant's symptoms, including pain, has not changed.

1 A claimant initially must produce objective medical evidence
2 establishing a medical impairment reasonably likely to be the cause of
3 the subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir.
4 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991). Once a
5 claimant produces objective medical evidence of an underlying impairment
6 that could reasonably be expected to produce the pain or other symptoms
7 alleged, and there is no evidence of malingering, the ALJ may reject the
8 claimant's testimony regarding the severity of his or her pain and
9 symptoms only by articulating specific, clear and convincing reasons for
10 doing so. Brown-Hunter v. Colvin, 798 F.3d 749, 755 (9th Cir.
11 2015)(citing Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir.
12 2007)); see also Smolen, supra; Reddick v. Chater, 157 F.3d 715, 722
13 (9th Cir. 1998); Light v. Social Sec. Admin., 119 F.3d 789, 792 (9th
14 Cir. 1997). Because the ALJ does not cite to any evidence in the record
15 of malingering, the "clear and convincing" standard stated above
16 applies.

17
18 Generalized, conclusory findings do not suffice. See Moisa v.
19 Barnhart, 367 F.3d 882, 885 (9th Cir. 2004)(the ALJ's credibility
20 findings "must be sufficiently specific to allow a reviewing court to
21 conclude the [ALJ] rejected [the] claimant's testimony on permissible
22 grounds and did not arbitrarily discredit the claimant's testimony")
23 (citation and internal quotation marks omitted); Holohan v. Massanari,
24 246 F.3d 1195, 1208 (9th Cir. 2001)(the ALJ must "specifically identify
25 the testimony [the ALJ] finds not to be credible and must explain what
26 evidence undermines the testimony"); Smolen, 80 F.3d at 1284 ("The ALJ
27 must state specifically which symptom testimony is not credible and what
28 facts in the record lead to that conclusion.").

1 2. The ALJ's Credibility Finding

2 Plaintiff made the following statements in a "Function Report -
3 Adult" dated June 13, 2014⁶
4

5 She lives with family in an apartment. She does not
6 take care of anyone else or pets. (See AR 193).

7 Her impairments cause her to experience the following
8 symptoms: "pain; muscle spasms; stiffness; limited range of
9 motion; numbness; tingling; swelling; shortness of breath;
10 dizziness; lightheadedness; poor balance; lack of stamina and
11 endurance; fatigue; weakness; heartburn; stomach cramping;
12 constipation; diarrhea; headaches; sensitivity to light,
13 noise, and climate changes; dry mouth; extreme thirst;
14 depression (with feelings of helplessness, hopelessness,
15 worthlessness, sadness, guilt, and frustration, isolation and
16 lack of motivation); anxiety (with racing heart and shortness
17 of breath lasting 15-60 mintues); mood swings; anger
18 outbursts; crying spells (lasting for 20-30 minunes)." She
19 uses prescribed glasses, and takes medicine (Plaquenil) (but
20 it causes her muscle weakness). (See AR 199, 201).

21 As a result of her impairments, she no longer is able to
22 work, bowl or hike. Her impairments affect her ability to
23 sleep; she has difficulty falling and staying asleep due to
24 the inability to find a comfortable position and due to
25 racing thoughts. Her impairments affect her abilities to
26 dress (she takes her time; she sits to put on pants, socks
27 and shoes; she often wears slip-on shoes to limit her time
28 standing and bending; she often wears comfortable clothing,
 including pajamas, and avoids wearing bras when she can; and
 she lacks motivation to change clothes); to bathe (she
 showers quickly; she leans on the shower walls; she uses a
 detachable shower head; and she lacks motivation to shower on
 a regular basis); to care for her hair (she has some
 difficulty reaching her arms up to wash and brush her hair;
 and she lacks motivation to care for her hair); to shave (she
 has difficulty grasping a razor; she has difficulty bending
 and reaching; she lacks motivation to shave); to feed herself
 ("[H]er appetite changes more often."); and to clip her
 toenails (she has difficulty bending; she gets pedicures).
 She does not need special reminders to take care of her
 personal needs and grooming or to take medicine. (See AR
 194-95).

29 On a daily basis, she prepares her own meals, simple
30 things like cereal, smoothies, sandwiches and salads which do
31 not take much time or preparation. It takes her 6 to 15

6 The form was completed by Plaintiff's representative.

1 minutes to prepare a meal. Her impairments have caused her
2 to avoid making big meals as often, and her boyfriend
3 sometimes helps her prepare meals or has to cook meals
4 himself. She has difficulty walking and standing in the
5 kitchen for a long period of time, and she needs to take
6 breaks. She takes her time taking items from cabinets and
7 the refrigerator. She is careful when she lifts and carries
8 pots and pans. She has difficulty concentrating, and easily
9 forgets that she is cooking. Her household chores are
washing dishes daily (a few minutes), wiping down counters
and tables daily (a couple of minutes), dusting twice a month
(20 to 30 minutes) and watering the patio plants every couple
of days (a few minutes). She relies on her boyfriend to help
her with household chores, because she has difficulty walking
and standing for a long period of time and she has difficulty
bending, squatting, kneeling and reaching. (See AR 195).

10 She goes out 4 to 6 days a week either driving a car or
11 riding in a car. She is able to go out alone. She drives,
but only for short distances. She has difficulty sitting in
the car for a long period of time. She has difficulty
twisting and turning, so she has to use the mirrors to check
for traffic. She has to hold onto the car door and/or
steering wheel to get in and out of the car. She experiences
increased stress and anxiety when driving on major highway
and in heavy traffic. Due to her lack of concentration, she
sometimes forgets where she is going and how to get to a
place, and she misses turns and gets lost. (See AR 196).

12 She shops in stores for groceries, household items,
13 clothes, personal interest items and prescriptions 1 to 3
times a week (20 minutes to 2 hours) and on computer 2 times
a month (20 minutes to a couple of days). She has to lean on
a shopping cart for support. She takes her time taking items
off of shelves. She has the bags packed light in order for
her to load and unload. She shops when the stores are not as
crowded. She takes a shopping list with her to remember what
to buy. She cannot sit at a computer for a long period of
time. She is able to pay bills, count change, handle a
savings account, and use a checkbook or money orders. (See
AR 197).

22 Her hobbies and interests are watching movies at home
(daily), sitting at the pool (daily), and spending time on
23 the computer (daily). She has to constantly shift positions,
and she has difficulty paying attention and recalling what
she watched or saw. Prior to her impairments, she did not
have difficulty sitting, paying attention, or remembering.
(See AR 197-98).

26 She spends time with her boyfriend and her son daily,
27 and she visits with her friends and family members regularly.
She does not go anywhere on a regular basis. She has
problems getting along with others; she easily becomes
irritated and frustrated with others. Prior to her
impairments, she went out with her friends more often. (See
AR 198-99).

1 Her day consists of the following: waking up around
2 10:00 or 11:00 a.m.; trying to work on returning phone calls
3 and making appointments; sitting at the pool to get some sun;
4 possibly shopping or cleaning around the house; preparing a
5 light lunch; talking to her son and taking him to work if
necessary; dressing and showering at some time during the
day; making dinner at around 8:30 p.m.; cleaning up and
visiting her boyfriend and son; and going to bed around
midnight. (See AR 193).

6 Her impairments affect her lifting, squatting, bending,
7 standing, reaching, walking (she can walk about one-half of
8 a mile before she has to stop and rest for at least 10 to 15
minutes), sitting, kneeling, talking, stair-climbing, memory
9 (short-term), completing tasks, concentrating (the amount of
time she can concentrate depends on how she feels and what
she is doing at the time), understanding, and following
10 instructions (she has to reread written instructions and to
have spoken instructions repeated). Her ability to work is
11 most significantly impacted by her problems with bending,
12 standing, walking, sitting and concentrating. She does not
13 have difficulty getting along with authority figures, and she
14 has never been fired or laid off from a job because of
problems getting along with others. Stress causes her to
become anxious, frustrated and depressed. Most of the time
she handles changes in routine well, but sometimes changes in
routine cause her stress. (See AR 193, 199-201).

15 Plaintiff gave the following testimony at the administrative
16 hearing (see AR 44-63):

18 She is 43 years old, 5'6" tall, and weighs 135 to 140
19 pounds. She does not have a significant other. She
20 graduated from high school in 1990, and attended college in
21 1991 and 1992 (but did not graduate). Since January 2015,
22 she has lived in an apartment with her mother, who works for
23 Verizon. She lives with her mother for free, but pays the
24 utilities. Prior to January 2015 she lived with her son.
25 She worked as a loan modification underwriter for JPMorgan
26 until June 8, 2012, when she left on disability (severe pain
27 and stress). In January 2015, after two years of disability
(2013 to 2015, during which time the doctor did not release
her to work), JPMorgan terminated her. She had talked to a
person at JPMorgan about returning to work with restrictions
(10 to 20 hours a week, sitting, standing, taking frequent
breaks), but she was told her restrictions could not be
accommodated. Her real estate license expired in 2013. She
drives her mother's car sometimes and a 1961 Ford Falcon
(she does not like to drive it; her lease on another car
expired in January 2015). (See AR 44-49, 52, 58-59).

1 She cannot work because of severe pain (body, hands,
2 neck, back, shoulders, lower waist, migraines [15 days a
3 month], fatigue, insomnia, anxiety, irritable bowel syndrome,
4 dry mouth, frequent urination, constipation, and diarrhea.
5 She takes Plaquenil, nortriptyline, cyclobenzaprine, Ambien,
6 and Soma (for the last few months). She believes the
7 prescription medications help her, but she does not know if
8 they do enough (the medications helped when she started
9 taking them). She also takes supplements and various over-
10 the-counter medications, such as Pepto Bismol, medicines for
11 dry mouth and dry eyes, Aleve, Excedrin and Tylenol. She
12 believes the over-the-counter medications help. She sees
13 somebody for mental health counseling through her church.
14 She presently does not attend support groups in person due to
15 difficulty getting around in her car. Prior to being
16 diagnosed, she participated in an 8-week behavioral cognitive
17 therapy program. She has been involved with online support
18 groups for arthritis, fibromyalgia, Sjogren's and Lupus, and
19 she used to attend a support group for arthritis two to three
20 times a month. (See AR 55-61).

21 On a daily basis, she gets up between 8 and 10 a.m. and
22 retires at 11 p.m. She has a cup of coffee and then tries to
23 eat. She usually showers within an hour of waking up, unless
24 she has to make telephone calls or leave for a doctor's
25 appointment. She brushes her teeth twice a day (at least)
26 and washes her hair twice a week. With respect to chores,
27 she washes her own dishes and does her own laundry (which
28 usually makes her hurt). Her mother takes out the trash,
29 cleans the floors, etc. She makes her own meals (prepared,
30 light, healthy meals) and her mother also makes meals.
31 (See AR 50-52).

32 She does general restorative yoga at home (once or twice
33 a week, but sometimes not for a couple of weeks, depending on
34 how she is feeling), as well as deep breathing, meditation,
35 chiropractor, massage and acupuncture. On good days she
36 tries to walk about one-half of a mile (every day, sometimes
37 3 or 4 days a week), but she has not been walking for a
38 couple weeks. She used to do aquatic therapy in the warm
39 pool of her old apartment. She wants to go to her gym, but
40 she has not felt good enough to drive there (3 to 4 miles
41 away). On good days (which occur between one-third and one-
42 half of the time) she does not have headache pain and is not
43 fatigued (so she can go to doctors' appointments, the gym,
44 the swimming pool, and can try to do yoga, grocery shopping,
45 doing laundry, etc.). On bad days she spends most of the day
46 in bed because of fatigue and pain, unless she has something
47 to do (i.e., doctor's appointment). (See AR 52-53, 60-63).

48 She has a laptop computer. She is barely on Facebook.
49 She does not watch much television. She reads books when she
50 can. She goes to church about once a month. Her only hobby
51 is trying to get healthy, learning about nutrition. (See AR
52 53-55).

1 She drinks two glasses of wine twice a week, when she
2 visits with friends or attends small parties. (See AR 49-
50).

3
4 After briefly summarizing Plaintiff's testimony (see AR 22), the
5 ALJ made the following findings: "After careful consideration of the
6 evidence, the undersigned finds that the claimant's medically
7 determinable impairments could reasonably be expected to cause the above
8 alleged symptoms; however, the claimant's statements concerning the
9 intensity, persistence and limiting effects of these symptoms are not
10 entirely consistent for the reasons explained in this decision." (AR
11 22).

12
13 The ALJ then discussed most of the medical evidence in the record,
14 (See AR 22-24). Following the discussion, the ALJ addressed Plaintiff's
15 credibility as follows:

16
17 The undersigned has analyzed the credibility of the
18 claimant's allegations pursuant to SSR 96-7p and finds they
19 are not fully credible. Despite her subjective symptoms and
20 difficulties, the claimant is able to perform basic
21 independent care, prepare simple meals, do household chores,
22 including washing dishes, laundry, make bed; go outside,
23 drive, take son to work when needed, shop in stores, handle
24 finances, watch movies, sit at the pool to get sun, read,
25 walk about a half mile (sic) three to five days a week; do
26 yoga, spend time on laptop going on Facebook, nutrition
27 research and online support groups; attend church once a
28 month, and socialize with boyfriend, friends and family (Ex.

1 4E; 9F:4;⁷ claimant's testimony). Overall, the claimant's
2 relatively intact daily activities are consistent with the
3 residual functional capacity described above. [¶] The
4 undersigned notes that multiple factors undermine the
5 credibility of the claimant's allegations. The documented
6 objective evidence discussed and the claimant's self-reported
7 range of everyday activities are inconsistent with functional
8 limitations to the degree alleged.

9 (AR 24, footnote added).

10

11 3. The ALJ's Assessment of Subjective Symptom Testimony

12

13 As set forth below, the ALJ failed to provide legally sufficient
14 reasons for discrediting Plaintiff's testimony about the intensity,
15 persistence and limiting effects of her pain and symptoms.⁸

16 ⁷ The ALJ cites to page 4 of the June 21, 2014 report of
17 examining psychiatrist Sohini P. Parikh. Under "Current Level of
18 Functioning," Dr. Parikh wrote the following:

19 The claimant lives with her boyfriend and son. The claimant is
20 able to drive. The claimant is able to manage funds and pay bills.
21 The claimant is able to do cooking, shopping, and housekeeping. [¶]
22 The claimant wakes up at around 10 am. The claimant cleans
23 herself. She goes to her appointments. She goes onto the
24 computer. She sometimes drops her son off at work. The claimant
25 also does some light work. [¶] The claimant gets along with family
members. The claimant does have close friends. The claimant has
no problems with neighbors. [¶] The claimant can focus attention
during this evaluation. The claimant does not have cognitive
problems completing household tasks. [¶] The claimant can follow
simple oral and written instructions. The claimant has no
difficulty making decisions.

(AR 982).

26 ⁸ The Court will not consider reasons for discounting
27 Plaintiff's subjective symptom testimony that were not given by the ALJ
28 in the decision. See Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir.
2003) ("We are constrained to review the reasons the ALJ asserts.");
(continued...)

1 First, the ALJ failed to "specifically identify 'what testimony is
2 not credible and what evidence undermines [Plaintiff's] complaints.'"
3 Parra v. Astrue, 481 F.3d 742, 750 (9th Cir. 2007) (quoting Lester v.
4 Chater, 81 F.3d 821, 834 (9th Cir. 1995)); see also Smolen, 80 F.3d at
5 1284 ("The ALJ must state specifically what symptom testimony is not
6 credible and what facts in the record lead to that conclusion").

8 Second, the ALJ's discounting of Plaintiff's testimony about her
9 symptoms and functional limitations based on her ability to perform
10 certain daily activities, such as performing basic independent care,
11 preparing simple meals, doing household chores (washing dishes, doing
12 laundry, making bed), going outside, driving, taking her son to work
13 when needed, shopping in stores, handling finances, watching movies,
14 sitting at the pool, reading, walking, doing yoga, spending time on
15 laptop going on Facebook, conducting nutrition research, participating
16 in online support groups, attending church once a month, and socializing
17 with boyfriend, friends and family, was not a clear and convincing
18 reason. See Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir.
19 2001) ("[T]he mere fact that a plaintiff has carried on certain daily
20 activities . . . does not in any way detract from her credibility as to
21 her overall disability. One does not need to be 'utterly incapacitated'
22 in order to be disabled."); Reddick, supra ("Only if the level of
23 activity were inconsistent with the Claimant's claimed limitations would
24 these activities have any bearing on Claimant's credibility."). While

26 ⁸ (...continued)
27 citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947), Pinto v.
Massanari, 249 F.3d 840, 847-48 (9th Cir. 2001)); and Garrison v.
Colvin, 759 F.3d 995, 1010 (9th Cir. 2014) ("We review only the reasons
provided by the ALJ in the disability determination and may not affirm
the ALJ on a ground upon which he did not rely.").

1 a plaintiff's ability to spend a "substantial part" of her day engaged
2 in pursuits involving the performance of physical functions that are
3 transferable to a work setting may be sufficient to discredit her, here,
4 there is no evidence that Plaintiff was spending a substantial part of
5 her day engaged in these activities or that the physical demands of such
6 tasks as performing basic independent care, preparing simple meals,
7 doing household chores (washing dishes, doing laundry, making bed),
8 going outside, driving, taking son to work when needed, shopping in
9 stores, handling finances, watching movies, sitting at the pool,
10 reading, walking, doing yoga, spending time on her laptop going on
11 Facebook, conducting nutrition research, participating in online support
12 groups, attending church once a month, and socializing with her
13 boyfriend, friends and family were transferable to a work setting. See
14 Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999).
15 Indeed, at the hearing, the ALJ did not ask Plaintiff about the amount
16 of time it took her to do or how often she did many of the above
17 activities. Thus, Plaintiff's admitted daily activities do not
18 constitute a legally sufficient reason to reject Plaintiff's subjective
19 symptom testimony.

20
21 It is not clear whether the ALJ considered Plaintiff's testimony
22 about her limited abilities to perform such daily activities (see AR 193
23 [Plaintiff testified, "I may shop or clean around the house. I try to
24 divide my energy and take my time doing tasks to avoid over exerting
25 myself and putting myself out for a couple of days."], 194 [Plaintiff
26 testified she takes her time getting dressed, sits to put on clothes,
27 wears certain shoes to limit time standing and bending, wears certain
28 clothes, and avoids wearing bras], id. [Plaintiff testified she showers

1 quickly, leans on shower walls, and uses a detachable shower head to
2 limit bending and reaching], id. [Plaintiff testified she has difficulty
3 reaching her arms up to wash and brush her hair], id. [Plaintiff
4 testified she has difficulty shaving because of difficulties with
5 bending, reaching and grasping the razor], 195 [Plaintiff testified she
6 has difficulty clipping her toenails because of difficulty with
7 bending]; id. [Plaintiff testified her boyfriend sometimes has to help
8 her prepare meals or had to cook them on his own, she has difficulty
9 preparing meals because of difficulty with walking and standing for a
10 long period of time, she takes her time getting items from cabinets and
11 the refrigerator, she had to be careful lifting and carrying pots and
12 pans, and she has trouble concentrating when making a meal], 196
13 [Plaintiff testified she has to rely on her boyfriend to help her with
14 chores because of difficulties with walking and standing for a long
15 period of time, and she has difficulty completing chores because of
16 difficulties with bending, squatting, kneeling and reaching], id.
17 [Plaintiff testified she drives short distances only, cannot sit in a
18 car for a long period of time, has to rely mostly on the car mirrors to
19 drive, and misses turns and gets lost], id. [Plaintiff testified she has
20 to lean on her shopping cart for support, she has to take her time
21 taking items off the shelves, she makes sure the shopping bags are
22 packed light, and she cannot sit at the computer for a long period of
23 time], 198 [Plaintiff testified that she has to constantly shift
24 positions when she watches movies at home, sits at the pool, and spends
25 time on the computer], 199 [Plaintiff testified she is able to walk one-
26 half of a mile before she has to stop and rest for at least 10 to 15
27 minutes], 51 [At the hearing, Plaintiff testified she usually hurts
28 after she does her own laundry], 51-52 [At the hearing, Plaintiff

1 testified her mother also makes meals], 52 [At the hearing, Plaintiff
2 testified she had not been able to do aquatic therapy lately], id. [At
3 the hearing, Plaintiff testified that she does yoga at home once or
4 twice a week, but that she sometimes is not able to do yoga for a couple
5 of weeks based on how she is feeling], 53 [At the hearing, Plaintiff
6 testified she had not felt good enough recently to drive her car 3 to
7 4 miles to the gym], id. [At the hearing, Plaintiff testified that on
8 "good days" she tries to walk about one-half of a mile and that
9 sometimes she can walk every day or 3 to 4 days a week, but that she has
10 not been able to walk much recently], id. [At the hearing, Plaintiff
11 testified she is barely on Facebook], 54 [At the hearing, Plaintiff
12 testified she tries to read books "when [she] can"], id. [At the
13 hearing, Plaintiff testified she attends church "[m]aybe once a month"],
14 and 57 [At the hearing, Plaintiff testified that she is involved in
15 support groups "[a]s much as [she] can be", but that "[s]ometimes she
16 [is] in too much pain to want to go out"]. Therefore, the degree to
17 which Plaintiff could perform such daily activities may not have been
18 inconsistent with her testimony regarding her symptoms and limitations.
19 See Reddick, supra; see also Morgan v. Commissioner of Social Sec.
20 Admin., 169 F.3d 595, 600 (9th Cir. 1999) ("If a claimant is able to
21 spend a substantial part of his day engaged in pursuits involving the
22 performance of physical functions that are transferable to a work
23 setting, a specific finding as to this fact may be sufficient to
24 discredit a claimant's allegations.").

25
26 Third, although the ALJ also found that there was a lack of
27 objective medical evidence supporting Plaintiff's testimony concerning
28 her symptoms and limitations, this factor cannot, by itself, support an

1 adverse finding about Plaintiff's testimony. See Trevizo v. Berryhill,
2 862 F.3d 987, 1001 (9th Cir. 2017)(once a claimant demonstrates medical
3 evidence of an underlying impairment, "an ALJ 'may not disregard [a
4 claimant's testimony] solely because it is not substantiated
5 affirmatively by objective medical evidence.'"; quoting Robbins v. Soc.
6 Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006)); Rollins v. Massanari,
7 261 F.3d 853, 857 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d 599, 602
8 (9th Cir. 1998); see also SSR 16-3p, 2017 WL 5180304, *7 ("We must
9 consider whether an individual's statements about the intensity,
10 persistence, and limiting effects of his or her symptoms are consistent
11 with the medical signs and laboratory findings of record. . . .
12 However, we will not disregard an individual's statements about the
13 intensity, persistence, and limiting effects of symptoms solely because
14 the objective medical evidence does not substantiate the degree of
15 impairment related-symptoms alleged by the individual.").

16
17 Because the Court finds that the the ALJ did not discount
18 Plaintiff's symptom testimony on legally permissible grounds, the Court
19 is unable to defer to the ALJ's credibility determination. Cf. Flaten
20 v. Sec'y of Health & Human Servs., 44 F.3d 1453, 1464 (9th Cir.
21 1995)(the court will defer to the ALJ's credibility determinations when
22 they are appropriately supported in the record by specific findings
23 justifying that decision)(citations omitted).

24
25 **B. Remand Is Warranted**

26
27 The decision whether to remand for further proceedings or order an
28 immediate award of benefits is within the district court's discretion.

1 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
2 useful purpose would be served by further administrative proceedings,
3 or where the record has been fully developed, it is appropriate to
4 exercise this discretion to direct an immediate award of benefits. Id.
5 at 1179 ("[T]he decision of whether to remand for further proceedings
6 turns upon the likely utility of such proceedings."). However, where,
7 as here, the circumstances of the case suggest that further
8 administrative review could remedy the Commissioner's errors, remand is
9 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);
10 Harman v. Apfel, supra, 211 F.3d at 1179-81.

11
12 Since the ALJ failed to properly assess Plaintiff's symptom
13 testimony, remand is appropriate. Because outstanding issues must be
14 resolved before a determination of disability can be made, and "when the
15 record as a whole creates serious doubt as to whether the [Plaintiff]
16 is, in fact, disabled within the meaning of the Social Security Act,"
17 further administrative proceedings would serve a useful purpose and
18 remedy defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir.
19 2014)(citations omitted).⁹

20 //
21 //
22 //

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24

⁹ The Court has not reached any other issue raised by Plaintiff
25 except to determine that reversal with a directive for the immediate
payment of benefits would not be appropriate at this time.
26 "[E]valuation of the record as a whole creates serious doubt that
Plaintiff is in fact disabled." See Garrison v. Colvin, 759 F.3d 995,
27 1021 (2014). Accordingly, the Court declines to rule on Plaintiff's
claim regarding the ALJ's error in failing to properly consider the
vocational and medical evidence (see Joint Stip. at 5-9). Because this
matter is being remanded for further consideration, this issue should
also be considered on remand.

ORDER

For the foregoing reasons, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: June 22, 2018

/s/
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE